IN THE

# *Supreme Court of the United States*

October Term, 1975

No. 75-1887

DAVID L. JONES, etc., et al.,

Petitioners

v.

ROBERT E. X. CARROLL,

Respondent

V. L. BOUNDS, etc., et al.,

Petitioners

v.

WILLIAM FLOYD JOHNSON, JR.,

Respondent

## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

TO: THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

The Petitioners respectfully pray that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fourth Circuit entered in this consolidated proceeding on March 31, 1976.

## OPINION BELOW

The opinion of the United States Court of Appeals for the

Fourth Circuit entered March 31, 1976, is not yet reported and is printed as Appendix A to this Petition. (A pp 17-26).

## JURISDICTION

The jurisdiction of this Court is evoked under 28 U.S.C. § 1254 (1).

## QUESTIONS PRESENTED

I. WHETHER A PRISON INMATE WHO IS TRANSFERRED WITHIN A STATE FROM ONE MEDIUM SECURITY INSTITUTION TO ANOTHER MEDIUM SECURITY INSTITUTION, WITHOUT THE IMPOSITION OF DISCIPLINARY PUNISHMENT, ENTITLED UNDER THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT AND THE REQUIREMENTS OF WOLFF v. McDONNELL, 418 U.S. 539 (1974) TO NOTICE OF THE REASONS FOR THE TRANSFER AND AN OPPORTUNITY TO BE HEARD.

II. WHETHER THE OPINION OF THE COURT OF APPEALS FOR THE FOURTH CIRCUIT IS CONSISTENT WITH WOLFF v. MvDONNELL, SUPRA, AND BAXTER v. PALMIGIANO, ... U.S. .... ...., 44 U.S.L.W. 4487 (April 20, 1976).

III. WHETHER THE FOURTH CIRCUIT COURT OF APPEALS ERRED IN CONCLUDING THAT WOLFF v. McDONNELL, SUPRA APPLIES TO A RECLASSIFICATION OR TRANSFER WHICH "MAY SUBJECT THE INMATE TO POTENTIALLY MATERIALLY ADVERSE EFFECTS."

IV. WHETHER THE FOURTH CIRCUIT COURT OF APPEALS ERRED IN CONCLUDING THAT WOLFF v. McDONNELL, SUPRA, IS RETROACTIVE TO RECLASSIFICATIONS AND TRANSFERS WHICH TOOK PLACE AFTER JUNE 26, 1974.



## CONSTITUTIONAL PROVISIONS INVOLVED

This case involves the Fourteenth Amendment to the Constitution of the United States.

## STATEMENT OF THE CASE

These consolidated cases arose out of like claims asserted by Robert E. X. Carroll and William Floyd Johnson, Jr., inmates of the North Carolina Department of Correction, to the effect that their intra-system transfers and/or reclassifications occurred without being afforded that degree of procedural due process required by WOLFF v. McDONNELL, 418 U.S. 539 (1974). In an opinion filed March 31, 1976, the Fourth Circuit held that, under the guiding principles of WOLFF v. McDONNELL, that "the standards established by [WOLFF v. McDONNELL and KIRBY v. BLACKLEDGE, .... F. 2d ...., No. 73-2236 (4th Cir., January 19, 1976)] require that an inmate subject to reclassification or transfer which took place after June 26, 1974, and which imposed a 'major change in the conditions of confinement' of the inmate, be afforded the hearing rights prescribed by WOLFF." The Court concluded that "even if the transfers were administrative, they should not, in this Court's opinion be exempted from the 'major change' approach." "While some courts have indicated that WOLFF may be applicable only to punitive transfers, other courts have concluded that it is often difficult factually to determine if the particular transfer is punitive or administrative. Additionally, they have indicated that WOLFF standards should be applied if the transfer, whether it be punitive or administrative, *may subject the inmate to potentially materially adverse effects. That latter approach would appear preferable and is adopted by this Court.*"[1] (Emphasis added.)

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According to information provided to the Fourth Circuit Court of Appeals by Ralph S. Strickland, Director of Management Information of the North Carolina Department of Correction, there were 34,800 transfers within the Division of Prisons of the North Carolina Department of Correction in 1974. These transfers included initial

## CARROLL v. JONES

### No. 75-1069

On October 25, 1974, Robert E. X. Carroll filed yet another pro se complaint in the United States District Court for the Middle District of North Carolina, Greensboro Division.[2]

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2
See CARROLL v. TURNER, No. C-89-G-72 (M.D.N.C., March 22, 1972); CARROLL v. TURNER, Civil No. 3058 — Raleigh (E.D. N.C., August 1, 1972); CARROLL v. TURNER, Civil No. 3067 — Raleigh (E.D.N.C., August 1, 1972); CARROLL v. OUTLAND, Civil No. 4002 — Raleigh (E.D. N.C., September 22, 1972); CARROLL v. BROWN, Civil No. A-72-80 (W.D.N.C., September 22, 1972); CARROLL v. BROWN, Civil No. 72-CVD-4182 (Buncombe County Superior Court, June 26, 1973); CARROLL v. BOUNDS, Misc. No. 125 (W.D.N.C., October 24, 1972); CARROLL v. TURNER, Civil No. 4080 — Raleigh (E.D.N.C. January 19, 1973); CARROLL v. BOUNDS, Civil No. A-C-73-18 (W.D.N.C., August 30, 1973); CARROLL v. JONES, No. 74-107-CRT — Raleigh (E.D.N.C. August 1, 1974); CARROLL v. JONES, No. 74-137-CRT (E.D.N.C., September 11, 1974); CARROLL v. ZANTHOS, No. M-74-199 (M.D.N.C., December 23, 1974); CARROLL v. JONES, No. 74-166-CRT (E.D.N.C. December 9, 1974); CARROLL v. BROWN, No. C-75-98-G (M.D.N.C., March 21, 1975); CARROLL v. JONES, No. C-75-117-G (M.D.N.C., April 2, 1975); CARROLL v. SHEPHERD, No. C-75-283-

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fn. 1 (cont'D)
assignments, transfers for the convenience of the inmate or to meet the needs of the Department, transfers as a result of promotion or demotion in custody level, temporary transfers to Central Prison Hospital for physical, dental, or psychiatric evaluation and treatment, etc. Further, he indicated that there are 77 units and institutions in which prisoners are housed in the custody of the Department of Correction. He further advised that as of November 19, 1975, there were 12,518 persons in the custody of the Department.

The 77 units which constitute the Division of Prisons of the North Carolina Department of Correction are located in 67 different counties, stretching from the Currituck Subsidiary in the east to the Haywood Subsidiary in the west, a distance of 475 miles. Fifteen of these units house less than 100 prisoners. Fifty from 100 to 200 prisoners, and ten house over 200 prisoners. The reason for this diffusion of facilities and wide distribution of the prison population is the desire of the State to facilitate work release and other rehabilitative programs and, whenever feasible, to keep prisoners near their families and within home counties, hopefully calculated to aid in their subsequent successful reentry into society.



In this Complaint he complained of being transferred from the Caswell County Subsidiary at Yanceyville, North Carolina to the Caledonia Correctional Institution at Tillery, North Carolina, without the benefits of due process—although apparently also complaining about the conditions of confinement at the Caswell County Subsidiary. In this Complaint he scatters contentions like buckshot, saying on one hand that he was transferred in order to inhibit his access to the courts and on the other hand "so that he could write all the writs he wanted."

On December 23, 1974, the District Court, *sua sponte*, filed an Order dismissing the Complaint. Carroll appealed and the Fourth Circuit Court of Appeals concluded that, under the guiding principles of WOLFF v. McDONNELL, that although "[i]t is not clear whether Carroll's transfer from one medium custody institution to another medium custody institution resulted in a major change in the conditions of his confinement. Certain facts alleged by Carroll do appear to indicate that Carroll's transfers may have been administrative rather than punitive. However, even if the transfers were administrative, they should not, in this Court's opnion be exempted from the 'major change's approach. While some courts have indicated that WOLFF may be applicable only to punitive transfers, other

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fn. 2 (cont'D)
G (M.D.N.C., July 8, 1975); CARROLL v. JONES, No. C-75-346-G (M.D.N.C., August 19, 1975).

Thus, after a plenary hearing in CARROLL v. TURNER, No. C-89-G-72 (M.D.N.C.), Chief Judge Eugene A. Gordon felt compelled to state the following:

> "A final comment concerning this case is in order. Plaintiff in this action is a frequent litigant in this Court as well as the District Courts of the Eastern and Western Districts of North Carolina. He has brought eleven actions in the Middle District alone, including four in the first five months of this year, and advised the Court that he is presently preparing for filing another petition. The Court is convinced that the Plaintiff refused to shave solely for the purpose of creating a colorable § 1983 claim. *Federal court litigation is merely a hobby for Inmate Carroll — a game he plays to help pass the time.*" (Emphasis added.)

courts have concluded that it is often difficult factually to determine if the particular transfer is punitive or administrative. Additionally, they have indicated that *WOLFF standards should be applied if the transfer, whether it be punitive or administrative, may subject the inmate to potentially materially adverse effects. That latter approach would appear preferable and is adopted by this Court. . . .*"[3] (Emphasis added.)

JOHNSON v. BOUNDS

No. 75-1867

On July 13, 1973, William Floyd Johnson, Jr., commenced a pro se action in the United States District Court for the Eastern District of North Carolina pursuant to 42 U.S.C. § 1983 alleging that on June 8, 1973 he was transferred from the Odom Correctional Institution to Central Prison in Raleigh where he spent his first twelve days on "lockup". The District Court dismissed the Complaint for failure to state a claim upon which relief could be granted and Johnson moved for an amended judgment pursuant to Rule 59(e) of the Federal Rules of Civil Procedure. Upon reconsideration of the Complaint and a study of the caselaw, the District Court filed its opinion August 20, 1973, concluding that the previous Order should stand unaltered.

On August 24, 1973, Johnson filed Notice of Appeal.

The Fourth Circuit concluded that "While pre-WOLFF standards are hardly well defined, they would appear to require at the very least, a response by the Defendants containing sufficient information to establish that the action complained of by the inmate was not so egregiously unfair as to require re-

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The Fourth Circuit Court of Appeals did not define what constituted "potentially materially adverse effects." Thus, it would appear that every transfer could be the subject of litigation and the trial court would be forced to subjectively weigh the facilities, programs and location of the sending and receiving institutions in order to determine whether or not the transfer "may subject the inmate to potentially materially adverse effects."



lief. Accordingly, the JOHNSON case is hereby remanded for futher proceedings below."

However, the dismissal in JOHNSON v. BOUNDS, No. 4365 — Raleigh (E.D.N.C., August 20, 1973), was only the opening shot — and not the end of the battle as Respondent Johnson led the Circuit Court to believe. On July 25, 1973, William Johnson, together with the 11 other inmates who had been transferred with him from Odom to Central filed McLAMB, et al. v. SANDERS, Civil No. 4380—Raleigh (E.D.N.C.), raising the identical issues which he previously raised in JOHNSON v. BOUNDS, supra. In fact, in McLAMB v. SANDERS, supra, Johnson filed an Affidavit in opposition to the Defendants' Affidavits in support of their Motion for Summary Judgment and also moved for appointment of counsel. He also moved the Court and obtained an Order extending the time within which he might respond to Defendants' Motions to Dismiss and for Summary Judgment until October 10, 1973. On December 20, 1973, the District Court filed an extensive Order denying the Plaintiffs' claims for relief and granted the Defendants' Motion for Summary Judgment. However, on September 10, 1973, Johnson had filed yet another civil rights action again presenting the identical contentions. JOHNSON v. LEWIS, Civil No. 4439 — Raleigh (E.D.N.C.). Once again the State responded and on December 4, 1973, the District Court filed yet another Order granting the Defendants' Motion for Summary Judgment — reserving one issue for further litigation. By Order filed February 21, 1974, the remaining issue, relating to the publications regulation of the Department of Correction was resolved.

In JOHNSON v. LEWIS, supra, District Judge Dupree held:

> . . . as regards Plaintiff's transfer to Central Prison on June 8, 1973, and the concomitant body search and seizure of various toiletries, the record clearly indicates sufficient basis for the action of the Defendants. The United States District Court for this District has previously held that the

identical transfer procedure of other inmates on the same day for the same reason was reasonable under the existing circumstances and thus not violative of the constitutional rights of the inmates there involved. GRANT v. BOUNDS, Civil No. 4371 (E.D.N.C., October 12, 1973). The GRANT decision clearly governs the June 8, 1973 transfer of Plaintiff herein. Specifically regarding the fact that the transfer to Central Prison occurred prior to the hearing ultimately held, the record shows the transfer to have been made for the purpose of maintaining order at the transfering institution. Such transfer is not unconstitutional. . . .[4]

In GRANT v. BOUNDS, Civil No. 4371 — Raleigh (E.D. N.C., October 12, 1973), Chief Judge John D. Larkins, Jr., in reviewing the identical contention of one of the other twelve inmates transferred from Odom Correctional Institution to Central Prison with Johnson on June 8, 1973, held that:

"Prior to June 8, 1973, a critical situation was developing at Odom Correctional Institution. There was a movement among the inmates to stop or disrupt farm work projects. Many inmates refused to work and there was danger of an institution wide strike. There were agitators who were circulating among their fellow inmates encouraging them to refuse to work. The situation threatened to spread . . . Prison officials conferred and decided that immediate action had to be taken. The Regional Classification Committee convened and determined which inmates that should be referred to the Central Classification Board for possible reassignment. Plaintiff was one of the inmates selected to be transferred to Central Prison to be personally interview-

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The Court of Appeals failed to recognize the doctrine of res adjudicata, in that Johnson had litigated completely, resulting in an unfavorable decision on identically the same issues involving the same parties. The principles of res adjudicata are fully applicable to § 1983 actions. PREISER v. RODRIQUEZ, 411 U.S. 475, 497 (1973).



ed by the Central Classification Board. Mr. C. T. Caudle, Superintendent of the Odom Correctional Institution, informed each of these inmates of the action that was being taken. Also, Mr. F. K. Sanders, Regional Superintendent, personally informed the 12 inmates of the reason for the action before they were transferred to Raleigh. The transfer of State prisoners from one State institution to another is peculiarly within the scope of administration of the state penal system. VERDE v. CASE, supra. Plaintiff's constitutional rights were not violated because of this transfer. Prison officials acted reasonably in transferring these inmates from Odom in order to prevent a crisis.[5]

## REASONS FOR GRANTING THE WRIT

## THE DECISION OF THE FOURTH CIRCUIT COURT OF APPEALS CONFLICTS WITH THE DECISION OF THIS COURT IN WOLFF v. McDONNELL, SUPRA, AND BAXTER v. PALMIGIANO, SUPRA, AND IF CARRIED TO ITS LOGICAL END, WOULD REQUIRE A DUE PROCESS HEARING IN EVERY ADMINISTRATIVE TRANSFER.

In reliance on what it conceives to be the holding of WOLFF v. McDONNELL, supra, the Fourth Circuit Court of Appeals has determined that "WOLFF standards should be applied if the transfer, whether it be punitive or administrative, may subject the inmate *to potentially materially adverse effects.*" (Emphasis added.) Thus, ". . . a prison inmate subject to reclassification or transfer which took place after June 26, 1974, and which imposed a 'major change in the conditions of confinement' of the inmate, [must] be afforded the hearing rights prescribed by WOLFF." Carried to its logical end, this theory requires notice and hearing before every administrative transfer, since the facilities are not fungible and each has its own

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It must be clearly noted that this is a pre-WOLFF transfer taking place on June 8, 1974. WOLFF is expressly not retroactive.

personality dependent upon its location in the state, facilities, type and age of construction, and availability of various programs and educational resources. The consequences of such a theory are absurb and certainly not compelled by the Constitution.

Although a serious disadvantage may accompany even an administrative transfer, the practical necessities of prison administration require that the administrative decision to transfer an inmate remain within the sound discretion of prison authorities. By "administrative" transfer, we mean one that is based fully on proper administrative and correctional criteria, and not on an inmate's institutional behavior. In a truly administrative transfer, the reasons for transfer are extrinsic to the inmate's prison behavior, and the decision to transfer will generally not be improved at all by providing notice and a hearing to the transferee.

A nondisciplinary transfer is closely akin to the initial determination of the place and specific facility for confinement which, in the North Carolina Department of Correction, is wholly vested in the Secretary of the Department of Correction. With all of the complexities of penology, sociology and criminology, much of which is in a state of undulating flux even for those expert in the field, courts and judges are not equipped to decide such matters. Obviously, no due process hearing is called for in selecting the institution of confinement by those charged with operational responsibility.

This Court's decisions clearly establish that there is no independent liberty interest created merely because an individual perceives suffered loss at the hands of the government. "The range of interests protected by procedural due process is not infinite." BOARD OF REGENTS v. ROTH, 408 U.S. 564, 570 (1972). For example, in ROTH, this Court recognized that the teacher's continued employment was of substantial "interest" to him (id. at 570), but held that it was not constitutionally significant since no liberty or property interest was



implicated. Similarly, injury to one's reputation may be of great importance to the individual effected and may be sufficient to prevail in a state defamation action, but reputational injury, absent more, does not implicate a liberty or property interest protected by the Due Process Clause. PAUL v. DAVIS, ... U.S. ..., 44 U.S.L.W. 4337 (March 23, 1976). The Fourth Circuit's simplistic conversion of a reclassification or transfer which "may subject the inmate to potentially materially adverse effects" into a "grievous loss" implicating the requirements of WOLFF, acknowledges that the Circuit Court really does not understand the WOLFF decision. The Due Process Clause does not extend to all governmental action which is adverse or is perceived as adverse by a particular individual but only to that action which affects a protected interest otherwise established.

A decision to reclassify or transfer an inmate does not deprive him of liberty; his liberty was withdrawn by his conviction. And, the speculation that a reclassification or transfer notation might effect future rights of the inmate does not vest an inmate with procedural rights at the time of reclassification or transfer.

The question in WOLFF was whether the protections of due process extend to prison disciplinary proceedings that may result in the reduction of prisoner's statutory good time credits or placement in punitive segregation. But this Court's decision did not turn upon the mere fact that a reduction in good time credits might effect the timing of the prisoner's release, i.e., it did not turn upon the simple identification of release from prison with constitutionally protected liberty. Instead, this Court focused narrowly on the nature and source of the prisoner's interest and the retention of his accumulated good time credits. Since that interest was created by statute and by statute could be extinguished only "in cases of flagrant or serious misconduct" (418 U.S. at 546), this Court concluded that "the prisoner's interest has real substance and is sufficient-

ly embraced within the Fourteenth Amendment 'liberty' to entitle him to those minimum procedures appropriate under the circumstances and required by the Due Process Clause to insure that the state created right is not arbitrarily abrogated;" (418 U.S. at 557).

In BAXTER v. PALMIGIANO, supra, this Court reiterates the holding of WOLFF in an apparent attempt to eliminate the confusion currently rampant in the lower federal courts in the application of WOLFF.

> "Finally, the Court of Appeals for the Ninth Circuit in No. 74-1194 held that minimum due process — such as notice, opportunity for response, and statement was necessary where inmates were deprived of privileges. 510 F. 2d, at 615. We did not reach the issue in WOLFF; indeed, we said '[w]e do not suggest, however, that the procedures required by today's decision for the deprivation of good time would also be required for the imposition of lesser penalties such as a loss of privileges' 418 U.S., at 572 n. 19. Nor do we find it necessary to reach the issue now in light of the record before us . . ."BAXTER v. PALMIGIANO, ... U.S. ..., 44 U.S.L.W. at 4492.

Transfers may be made for a number of reasons:

> "It may be for 'security' if . . . it is predicated on the apprehension of general uncontrollable disturbance or on predictions of future misconduct by an inmate. It may be for the best interests of other inmates if the prisoner is disruptive, a threat to others, or otherwise a bad influence . . . A transfer may be for the best interest of the prisoner himself, for his safety or for his rehabilitation if it is believed that he will be better off elsewhere. And a transfer may be dictated by the needs or shortcomings of the institution, e.g., to alleviate overcrowding." GOMES v. TRAVISONO, 490 F. 2d 1209, 1214 (1st Cir. 1974).

We add that transfers may also be justified by the inmate's need for medical care, or to move him to appear before a classification board or disciplinary committee, or to move him to an institution closer to his point of release or more appropriate in light of the time remaining to be served. In almost all of these cases transfers may be predicated not only on proof of supporting facts, but also upon a reasonable subjective belief (or even suspicion) that such supporting facts are present. Many of the causes for transfers simply are not susceptible of objective delineation — such as the safety of the inmate or the institution — although theoretically objectifiable, are so important that officials may be compelled to act before suspicions can ripen into proof.



The Second Circuit Court of Appeals analysed the problem well in SOSTRE v. McGINNIS, 442 F. 2d 178, 197 (en banc), cert. denied *sub nom.* SOSTRE v. OSWALD, 404 U.S. 1049:

> It is sad but true that the study of the prison subculture by psychologists and sociologists has until recently been largely neglected. Those who have looked into the problem, however, do not gainsay the volatility of relationships between prisoners and prison officials . . . We would not presume to fashion a constitutional harness of nothing more than our guesses. It would be mere speculation for us to decree that the effect of equipping prisoners with more elaborate constitutional weapons against . . . prison authorities would be more soothing to the prison atmosphere and rehabilitative of the prisoner or, on the other hand, more disquieting and destructive of remedial ends. This is a judgment entrusted to state officials, not federal judges.

For quite different reasons, WOLFF hearings are unsuitable for decisions involving transfers to different rehabilitative programs at different institutions. The important factual questions in making such transfer decisions relate either to the program at the transferring institution (a subject unlikely to be enlightened by contributions from the inmate) or to the inmate's personal prognosis. Although the inmate surely has an impor-

tant contribution to make to the later, it is most appropriately made in diagnostic interviews and personal performance under observation in prison recreation and employment, and in communications that are incorporated in reports which are an integral part of the transfer decision. The inmate's contributions cannot usefully be made in adversary hearings in response to notice of "charges".

Still other transfer decisions involve specific facts. When a prisoner is transferred because of overcrowding, for example, the most relevant facts concern the comparative population density of the two involved institutions; because the inmate cannot meaningfully contribute to the resolution of any factual dispute about these conditions, trial-type hearings should not be constitutionally required. Where a hearing cannot serve the purpose for which it is designed, it is not inflexibly required by the Constitution.

In 1974, 34,800 transfers took place in the North Carolina Department of Correction. Nationally, in the state and federal systems, the number must reach hundreds of thousands of transfers each year. And yet, the Fourth Circuit simplistically requires that "WOLFF standards should be applied if the transfer, whether it be punitive or administrative, *may subject the inmate to potentially materially adverse effects.*" (Emphasis added.) In other words, in order to comply, WOLFF-type procedures would be required in each and every decision to move an inmate from one institution to another, regardless of the needs of the institution or the good faith administrative decisions of the correctional officials.

Furthermore, by holding that WOLFF standards are applicable when a transfer "may subject the inmate to potentially materially adverse effects" and concluding that this standard is applicable to reclassifications or transfers which took place after June 26, 1974, the date this Court announced the WOLFF decision, the Fourth Circuit Court of Appeals has opened a Pandora's Box of litigation—the extent of which could overwhelm the federal courts and totally disrupt the functioning of correctional systems.



## CONCLUSION

The decision of the Fourth Circuit in the application of the WOLFF doctrine in this case extends well beyond the intent of this Court. It is clear that this Court's holdings in WOLFF and BAXTER do not envision the conclusion reached in the case at bar. The application of extensive due process requirements to administrative transfers which "*may subject the inmate to potentially materially adverse effects,*" is not the situation to which he decision in WOLFF applies. (Emphasis added.)

A civil servant sent to Alaska, a soldier sent to Viet Nam, or a prisoner sent to another institution, may in a private sense, suffer "grievous loss", but the nature of the organization and their role precludes acknowledging any "liberty" or "property" right to remain in one location. And, obviously, if a municipal police officer can be discharged without notice and hearing unless he has vested rights in governmental employment, BISHOP v. WOOD, ... U.S. ..., 44 U.S.L.W. 4820 (June 8, 1976), how can a prison inmate say that he has a property right to remain in a prison in which he has been temporarily placed?

The Fourth Circuit Court of Appeals erred not only in applying WOLFF as it did, but, also, in holding that WOLFF applies retroactively to all such situations. Any one of the questions presented, much less in combination, present questions of immediate, vital importance, not only to the North Carolina Department of Correction, but also to the administrators of the correctional systems of our sister states and the United States Bureau of Prisons. We believe that the questions submitted are truly substantial and present to this Court far-reaching issues of vital importance that must be answered if

correctional administrators are to retain any control whatsoever.

Respectfully submitted,

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# Appendix A
## *United States Court of Appeals*
### FOR THE FOURTH CIRCUIT

No. 73-2159

DONALD BENFIELD,

Appellant,

versus

VERNON BOUNDS, etc, et al.,

Appellees.

No. 75-1069

ROBERT E. X. CARROLL,

Appellant,

versus

DAVID L. JONES, etc., et al.,

Appellees.

No. 75-1867

WILLIAM FLOYD JOHNSON, JR.,

Appellant,

versus

V. L. BOUNDS, etc., et al.,

Appellees.

No. 75-1868

LEROI DENSON,

Appellant,

versus

DEPARTMENT OF CORRECTIONS, etc.,

Appellee.

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Appeals from the United States District Court for the Eastern District of North Carolina, Raleigh Division (Nos. 73-2159 and 75-1867), from the United States District Court for the Middle District of North Carolina, Greensboro Division (No. 75-1069), and from the United States District Court for the Eastern District of Virginia, Richmond Division (No. 75-1868).

(Argued December 1, 1975 Decided Mar. 31, 1976

Before HAYNSWORTH, Chief Judge, CRAVEN, Circuit Judge, and KAUFMAN,* District Judge

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Deborah G. Mailman, Court-Appointed Counsel for Appellants in Nos. 75-1867, 75-1069 and 75-1868 (Jack Greenberg and Stanley A. Bass on brief for Appellant in No. 73-2159); Jacob L. Safron, Special Deputy Attorney General of North Carolina, and (Rufus L. Edmisten, Attorney General of North Caroiina, on brief) for Appellees in Nos. 73-2159, 75-1069 and 75-1867; Burnett Miller, III, Assistant Attorney General of Virginia, and (Andrew P. Miller, Attorney General of Virginia, on brief) for Appellee in No. 75-1868.

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*Sitting by Designation

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KAUFMAN, District Judge:

In these four cases each of the plaintiffs, three of them confined in North Carolina correctional institutions and one, Denson, in such a Virginia institution, appeal from denial of relief sought in connection with transfers and/or reclassifications. Each of them, proceeding *pro se*, has alleged that his intra-confinement system transfers and/or reclassifications occurred without his being afforded that degree of procedural due process required by *Wolff v. McDonnell*, 418 U.S. 539 (1974).[1] In *Kirby v. Blackledge*, ... F.2d ..., No. 73-2236 (4th Cir. January 19, 1976), this Court has recently held that the requirements of

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While certain other claims have been made by plaintiffs Benfield, Carroll and Denson, they do not appear to state meritorious grounds for relief. The denial of those claims by the court below is therefore hereby affirmed in *Benfield*. In *Carroll* upon remand, those claims should however be further examined by the court below and ruled upon expressly. In *Denson*, plaintiff's double jeopardy claim is referred to *infra* in the body of this opinion.



*Wolff* relating to intra-prison disciplinary proceedings are applicable with regard to intra-prison reclassifications. In *Kirby*, the actions complained of by the inmates allegedly resulted in each of them being subjected to conditions of confinement less favorable to them.[2]

The Supreme Court's disposition of *Wolff* took place on June 26, 1974. In *Wolff* (at 573-74), Mr. Justice White made clear that the Court's decision in *Wolff* was not to be accorded retroactive effect. In *Cox v. Cook*, 420 U.S. 734 (1975), the Supreme Court again made that crystal clear as we have recognized in *Williams v. Bounds*, No. 75-2380 (4th Cir. January 2, 1976), *Russell v. Division of Corrections*, No. 75-1441 (4th Cir. December 16, 1975), and *Perry v. Bordenkircher*, No. 74-1957 (4th Cir. June 25, 1975).

All four plaintiffs are in confinement at this time. While none of them is now confined in the same location to which he was transferred or reclassified, each of them seemingly contends that the transfer and/or reclassification of which he complains continues on his record and either presently or in the future may adversely affect him within the confinement system in which he is an inmate. Accordingly, even if damage claims are not involved,[3] none of the within four cases would appear moot, particularly in the absence of any notation, among plaintiffs' institutional records, of the type referred to in *Preiser v. Newkirk*, 422 U.S. 395, 402 (1975), indicating that one or more of their transfers " 'should have no bearing in any future determinations made by the Board of Parole or the time allowance committee.' "

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*See* Wolff v. McDonnell, *supra* at 571-72 n.19. Whether the "rationale of *Wolff*" applies to initial classifications is an issue noted but not decided in Williams v. Bounds, No. 75-2380 (4th Cir. January 2, 1976). The record in *Kirby* discloses that it involved reclassifications, not initial classifications.

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*See* Powell v. McCormack, 395 U.S. 486, 495-97 (1969); Burke v. Levi, No. 75-1695 (4th Cir. November 12, 1975).

## BENFIELD

Benfield's complaints relate to his transfers within the North Carolina prison system in June 1971, between November 1971 and March 1972, between March 1972 and June 1972, between August 1972 and January 1973, and in June 1973. Benfield seeks injunctive and declaratory relief, but not damages.

The record in *Benfield* includes reponses by defendants and a number of affidavits which, together with Judge Dalton's careful factual exploration as set forth in his opinion in the court below, establish that in June 1971 defendants were in receipt of what they described as "reliable information . . . from outside sources" that Benfield, whose record reveals seven felonies and four escapes, had arranged, for purposes of escape, to have two pistols smuggled into the confinement institution then housing him. One loaded automatic was found within the prison walls. Thereafter, Benfield and a second inmate were transferred to another institution. Although no charges were preferred against him, Benfield was subsequently orally informed in July 1971 at an appearance before a classification board of the reason for his transfer. Benfield denied any involvement with the gun matter, both then and in November 1971 when he once again appeared before a classification board.

In March 1972, after a pipe wrench had been found at the institution at which Benfield was then confined, and after an inmate had given information that both a wrench and an automatic pistol had been smuggled in, an investigation was undertaken by the institution's officials. The pistol was not found. Benfield volunteered to take a lie detector test but that test was not administered, at first because Benfield was on certain prescribed medication. However, although the medication was discontinued for a five-day period, the test was not administered during those five days. Thereafter, the medication was resumed and the test was not given. Judge Dalton has noted: "Defendants have not indicated why the test was not administered to the plaintiff." Seemingly, the test could have been given to Benfield during the five-day period.



Benfield also submitted to a classification board sworn affidavits of two inmates that another inmate was overhead by them, in a conversation with a custodial officer, to admit that that latter inmate had falsely charged Benfield in connection with the March 1972 pistol episode. Also, Benfield again denied involvement in that matter when he appeared before a classification board in June 1972. That board, however, decided to keep Benfield in the medium custody arrangements then pertaining to him. In August 1972, after the institution then housing Benfield changed its medium cusody policies, Benfield, after another appearance before a classification board, was determined in need of more supervision than would have been available in medium custody after the change in policy and was transferred to close custody.

Each time Benfield appeared before a classification board, he was apparently informed of the reasons for his appearance and afforded the opportunity to present his side of the matter, but was not given notice and hearing of the type mandated by *Wolff*. In June 1973, the classification board assigned Benfield to medium custody in another institution, noting "his good adjustment" but concluding that because of "his history of escapes and the previous 2 incidents", *i.e.*, the two weapon smuggling matters referred to *supra*, "it was the feeling of the Board that Benfield was in need of a very structured situation."

All of the actions of which Benfield complains took place before June 26, 1974. Thus *Wolff* does not control as to them. Nor does Judge Dalton's grant of defendants' motion for summary judgment offend pre-*Wolff* standards in the context of the facts of this case. As *Wolff* and *Kirby* recognize, an inmate should be afforded a relatively high degree of procedural due process before he is reclassified and placed in more restrictive custody because of alleged actions on his part, in order to enable him to present fully his side of the factual and legal issues.

In Benfield's case, it would have been preferable if *Wolff* standards had been effective in 1971, 1972 and 1973 and had enabled Benfield to have had the opportunity to proceed within the bounds of such process. But the overwhelming burden which would be imposed on prison officials if they were required presently to reexamine past reclassifications and transfers, such as those involving Benfield, of all inmates now in custody demonstrates the wisdom of the Supreme Court's determination not to make *Wolff's* application retroactive. That is not to say that pre-*Wolff* standards require reviewing courts to refuse relief in cases in which reclassification and/or transfer resulted from egregiously discriminatory or arbitrary conduct on the part of prison officials.[4] But the treatment accorded to Benfield in no way approaches that level. Accordingly, the grant of summary judgment by the district court is hereby affirmed in Benfield's case.

## JOHNSON

Johnson, complaining of a June 1973 transfer which allegedly occurred without his being informed of any reason for the same, seeks declaratory and injunctive relief and also damages. The district court dismissed the complaint without requiring a response. The facts which can be gleaned from Johnson's complaint are very sparse. While pre-*Wolff* standards are hardly well defined, they would appear to require, at the very least, a response by the defendants containing sufficient information to establish that the action complained of by the inmate was not so egregiously unfair as to require relief. Accordingly, the *Johnson* case is hereby remanded for further proceedings below.

## CARROLL

Carroll, asking for declaratory and injunctive relief and dam-

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"Classifcation of inmates is a matter of prison administration and management with which federal courts are reluctant to interfere except in extreme circumstances." Williams v. Bounds, *supra* (4th Cir. January 2, 1976). That comment was written in the context of pre-*Wolff* law.



ages, complains of transfers in October and December 1974, as well as other alleged denials of constitutional rights. The district court dismissed the complaint without requiring any response from defendants. *Wolff* and *Kirby* are both applicable in this case. In this Court's view, the standards established by those two cases require that a prison inmate subject to reclassification or transfer which took place after June 26, 1974, and which imposed a "major change in the conditions of confinement" of the inmate,[5] be afforded the hearing rights prescribed by *Wolff*. In this case it is not clear whether Carroll's transfer from one medium custody institution to another medium custody institution resulted in a major change in the conditions of his confinement. Certain facts alleged by Carroll do appear to indicate that Carroll's transfers may have been administrative rather than punitive. However, even if the transfers were administrative, they should not, in this Court's opinion, be exempted from the "major change" approach. While some courts have indicated that *Wolff* may be applicable only to punitive transfers,[6] other courts have concluded that it is often difficult factually to determine if a particular transfer is punitive or administrative. Additionally, they have indicated that *Wolff* standards should be applied if the transfer, whether it be punitive or administrative, may subject the inmate to potentially materially adverse effects.[7] That latter approach would appear

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Wolff v. McDonnell, *supra* at 571-72 n.19.

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*See* Aikens v. Lash, 514 F.2d 55, 58-59 (7th Cir. 1975); Stone v. Egeler, 506 F.2d 287 (6th Cir. 1974); Haymes v. Montanye, 505 F.2d 977 (2d Cir. 1974), *cert. granted*, 43 U.S.L.W. 3681 (June 30, 1975).

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*See* Lokey v. Richardson, .... F.2d ...., No. 74-1256 (9th Cir. December 9, 1975); Carlo v. Gunther, 520 F.2d 1293, 1295 (1st Cir. 1975); Fano v. Meachum, 520 F.2d 374, 396 n.2 (1st Cir. 1975), *cert. granted*, 44 U.S.L.W. 3339 (December 8, 1975); Gomes v. Travisano, 510 F.2d 537, 541 (1st Cir. 1975). *Cf* Newkirk v. Butler, 449 F.2d 1214, 1217-18 (2d Cir. 1974), *vacated on grounds of mootness*, 422 U.S. 395 (1975). The

preferable and is adopted by this Court. In this case, it requires a remand so that the district court can in turn require the defendants to respond to Carroll's allegations. Upon remand and after defendants do so further respond, the district court may itself determine whether it desires to await the decision of the Supreme Court in *Haymes v. Montanye*, 505 F.2d 977 (2d Cir. 1974), *cert. granted*, 43 U.S.L.W. 3687 (June 30, 1975), and *Fano v. Meachum*, 520 F.2d 374 (1st Cir. 1975), *cert. granted*, 44 U.S.L.W. 3339 (December 8, 1975). Those two cases are presently calendared by the Supreme Court for argument in tandem. The question presented to the Supreme Court in the petition for certiorari in *Haymes v. Montanye* is:

> Whether a prison inmate who is transferred within a state from one maximum security institution to another maximum security institution, without the imposition of disciplinary punishment, is entitled under the Due Process Clause of he Fourteenth Amendment to notice of the reasons for the transfer and an opportunity to be heard?

The questions presented in the petition for certiorari in *Fano v. Meachum* are:

> 1. Whether a prison inmate who is transferred, within a state, from a medium security institution to a maximum security institution, when there is no imposition of disciplinary punishment at the receiving institution, is entitled under the Due Process Clause of the Fourteenth Amendment to more than a notice of the proposed transfer and an opportunity to be heard in opposition to the transfer?
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> 2. Whether the Commonwealth of Massachusetts has sufficiently created an interest in remaining in any one prison to be cognizable as "liberty" or "property" under the Fourteenth Amendment?

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First Circuit's comment in *Carlo* (at 1296) that "[n]or is it determinative that the transfer occurred within a single institution" is applicable in *Denson*.



> 3. Whether the Due Process Clause of the Fourteenth Amendment requires disclosure of informant information when, in the judgment of prison officials, such disclosure would create a substantial likelihood of harm to the informants?
>
> 4. Whether the opinion of the Court of Appeals for the First Circuit is consistent with opinions of this Court?

## DENSON

Denson, complaining of a reclassification within the same Virginia confinement institution, apparently seeks only equitable relief. Seemingly also, that reclassification occurred no earlier than during October 1974. Denson's *pro se* complaint reveals that he may have been given a hearing in connection with a disciplinary charge and found after such hearing to have committed an infraction of prison rules. However, Denson alleges he was not given another hearing prior to his reclassification. Judge Merhige, in the court below, dismissed Denson's complaint without calling for a response by defendants.

In *Landman v. Royster*, 333 F. Supp. 621 (E.D. Va. 1971), Judge Merhige, well in advance of *Wolff*, required procedural due process in a prison disciplinary setting. In *Cousins v. Oliver*, 369 F. Supp. 553 (E.D. Va. January 14, 1974), Judge Merhige held that even though the prisoner-plaintiff had been afforded an appropriate hearing by an institutional adjustment committee and had been found to have violated prison regulations, nevertheless the prisoner was subsequently entitled, absent good reasons to the contrary, to a further classification hearing before a transfer to more restricted conditions of custody. Without reaching the issue decided by Judge Merhige in the *Cousins* case, this Court, in this case, in which post-*Wolff* standards prevail, hereby remands to the district court so that that Court may reconsider the *Wolff*-type issue after defendants have been required to respond to Denson's rather unclear complaint.[8]

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The district court may also, as suggested *supra* in the discussion re

Denson also asserts a double jeopardy claim, based on the fact that he was allegedly reclassified for the same incident for which he had been previously disciplined prior to his reclassification. That contention is without merit and need not be further considered by the district court upon remand.[9]

The judgment of the court below in *Benfield* is affirmed. The *Johnson*, *Carroll* and *Denson* cases are remanded for further proceedings in accordance with this opinion.

BENFIELD AFFIRMED; JOHNSON, CARROLL, AND DENSON REMANDED WITH INSTRUCTIONS.

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*See* Cousins v. Oliver, *supra* at 556; Almanza v. Oliver, 368 F. Supp. 981, 984 n.3 (E.D. Va. 1973). *Cf.* Fano v. Meachum, *supra* at 376 n.1 (no double jeopardy is involved where criminal prosecution follows disciplinary proceeding based on same conduct); Daigle v. Hall, 387 F.Supp. 652, 661-62 (D. Mass. 1975) (same).

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*Carroll*, desire, after defendants so respond, to await the Supreme Court's opinion in *Montanye* and *Fano*.